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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 848

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court,
District of Delaware

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, READING COMPANY, SOUTHERN PACIFIC COMPANY, TOLEDO, PEORIA & WESTERN RAILROAD COMPANY, NORTHWEST CANNERS AND FREEZERS ASSOCIATION, INC., and CANNERS LEAGUE OF CALIFORNIA, *Appellees.*

On Appeal From the United States District Court, District of Delaware

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JURISDICTIONAL STATEMENT

Appellant Luckenbach Steamship Company, Inc., appeals from the judgment of the United States District Court for the District of Delaware entered December 14, 1959, stayed by order of that court until December 22, 1959, dismissing appellant's complaint.

This Statement shows that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is reported at 179 F. Supp. 605. Copies of that opinion, the court's orders of December 14 and 15, 1959, and the Interstate Commerce Commission order and action, sought to be reviewed, are set forth in Appendix A, *infra*, pp. 1a-26a.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336-1337, 1398, 2284, and 2321-2325, Section 10 of the Administrative Procedure Act (5 U.S.C. § 1009), Sections 1, 2, and 3 of the Sherman Act (15 U.S.C. §§ 1, 2, 3), and Sections 12 and 16 of the Clayton Act (15 U.S.C. §§ 22, 26), for an injunction (a) setting aside the Commission's denial of appellant's petition for suspension of certain railroad rates, (b) directing the Commission to suspend those rates, and (c) directing the defendant railroads to terminate a combination and conspiracy (1) to monopolize the transportation of canned goods from Pacific Coast origins to North Atlantic destinations and (2) to drive appellant from the intercoastal trade. The District Court entered judgment on December 14, 1959; but postponed its effectiveness to December 22, 1959. Notice of appeal was filed in that court on February 9, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b) and is supported by *United States* v. *Amarillo-Borger Express*, 352 U.S. 817 (1956); *United States* v. *Dixie Carriers*, 353 U.S. 906 (1957). *Cf. Two Guys from Harrison-Allentown* v. *McGinley*, 273 F. 2d 954 (3d Cir. 1959).

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QUESTIONS PRESENTED

1. Whether arbitrary and capricious refusal by the Commission to suspend the operation of a protested rate schedule is judicially reviewable.

2. Whether the Commission has primary jurisdiction, exercise of which is a prerequisite to judicial consideration, of appellant's complaint for relief under the antitrust laws against a conspiracy by the railroad defendants and others to destroy appellant's intercoastal service by establishing a reduced transcontinental rate on canned goods.

3. Whether it was error for the district court, even assuming the Commission's primary jurisdiction, to dismiss appellant's antitrust complaint instead of retaining jurisdiction and merely suspending judicial proceedings pending the Commission's determination with respect to the antitrust charge.

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act (49 U.S.C. § 15(7)); section 10(e) of the Administrative Procedure Act (5 U.S.C. § 9(e)), sections 1 and 3 of the Sherman Act (15 U.S.C. §§ 1, 3), and section 16 of the Clayton Act (15 U.S.C. § 26), are set forth in Appendix B, *infra*, pp. 27a-31a.

STATEMENT OF THE CASE

In September 1959, defendant railroads and others proposed reductions in their rates for the transportation of canned goods from the Pacific Coast to the East, to be effective October 23, 1959, and to expire October 22, 1960, one year later.

Appellant entered the water transportation business over 100 years ago and is now the last remaining gen-

eral cargo carrier in the United States intercoastal trade (R. 42, 180). Canned goods are the indispensible "backbone" of its business, constituting 40% of its traffic (R. 7). The proposed railroad rate, below the railroads' costs (R. 7, 22), would result in a sacrifice of rail revenue (R. 7, 22) thus constituting unfair and destructive competition in violation of the National Transportation Policy. The reduction was intended to and would seriously injure or destroy Luckenbach and would then expire a year from its effective date (R. 21).

Appellant and other water and motor carriers and port interests petitioned the Commission to suspend and investigate the proposed reduction. The petitions and the replies thereto by the railroads and supporting shipper interests, were referred to the Commission's Board of Suspension.[1] The Board denied the petitions. On appeal, Division 2 instituted an investigation but, notwithstanding the temporary nature of the reduction, refused to order its suspension (Appendix A, *infra*, pp. 23a-25a).

Appellant promptly filed its complaint in the district court. The court issued a temporary restraining order against the Commission, which thereupon entered its suspension order (Appendix A, *infra*, p. 25a). Appellees then moved to dissolve the temporary restraining order and to dismiss the complaint for want of jurisdiction.

The district court, accepting the truth of the facts alleged, nevertheless held that it was without power

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[1] A board of five Commission employees to which, under section 17(2) of the Interstate Commerce Act (49 U.S.C. § 17(2)), the Commission has delegated authority to take initial action on such protests and petitions.

to afford relief. It granted appellees' motions, holding[2] that section 15(7) of the Interstate Commerce Act[3] commits the suspension power to Commission discretion and, therefore, by reason of the introductory clause of section 10 of the Administrative Procedure Act,[4] "it is not reviewable—even for arbitrariness or abuse of discretion".[5]

The three-judge district court held that it had jurisdiction of the antitrust cause of action. It also held that the collective ratemaking exemption granted by the Commission pursuant to section 5a of the Interstate Commerce Act (49 U.S.C. § 5b) "certainly does not sterilize all forms of conspiratorial action," but it concluded "it is incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption." 179 F. Supp. at p. 613; Appendix A, *infra*, p. 15a. And, instead of retaining the antitrust cause on its docket, it dismissed the complaint.

THE QUESTIONS ARE SUBSTANTIAL

Reviewability of Administrative Abuse of Discretion

The lower court's holding that there is no judicial power to correct an arbitrary and capricious refusal by the Commission to suspend a below-cost rail rate, accentuates a deep split among three-judge courts throughout the country. One line of decisions holds that arbitrary Commission action under the rate-sus-

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[2] 179 F. Supp. at p. 610, Appendix A, *infra*, p. 9a.

[3] Appendix B, *infra*, p. 27a.

[4] This clause states in relevant part "... except so far as ... (2) agency action is by law committed to agency discretion ..." (Appendix B, *infra*, p. 28a).

[5] 179 F. Supp. at p. 609, Appendix A, *infra*, p. 6a.

pension power is judicially reviewable [6] and the other that it is not.[7]

The existence of this division of authority was most recently recognized in *Bison Steamship Corp.* v. *United States* (N.D. Ohio, E. D.; Civ. No. 35783, March 28, 1960):

> "*Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605 (D.Del. 1959), and many of the cases cited therein, seem sufficient authority for this Court to grant the motion to dismiss without further discussion. Judge Wright's highly-documented and well-reasoned opinion, if followed to its furthest logical extreme, indicates that under no conceivable circumstance is the Commission's refusal to suspend under Section 15(7) subject to judicial review. However, since such an unlimited reading of the case would appear to put it in conflict with *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y. 1958), this Court chooses to base its decision on other grounds."

Moreover, courts increasingly are questioning earlier broad generalizations that they are completely impotent

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[6] *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N.D. Tex. 1956), *Long Island Rail Road Company* v. *United States*, 140 F. Supp. 823 (E.D.N.Y. 1956), *Dixie Carriers* v. *United States*, 143 F. Supp. 844 (S.D. Tex. 1956), *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D.N.Y. 1958), *Marine Transport Lines* v. *United States*, 173 F. Supp. 326 (D.C. 1959).

[7] *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (N.D. Ala. 1935), *National Water Carriers Association* v. *United States*, 126 F. Supp. 87 (S.D. N.Y. 1954), *Coastwise Line* v. *United States*, 157 F. Supp. 305 (N.D. Calif. 1957), *Carlsen* v. *United States*, 107 F. Supp. 398 (S.D. N.Y. 1952), *Acme Fast Freight* v. *United States*, 135 F. Supp. 823, *Acme Fast Freight* v. *United States*, (unreported Civil Action No. 1761, District of Delaware, Judge Rodney), *Mechling Barge Lines* v. *United States*, unreported, (Civil Action No. 57-c 1450, Northern District of Illinois, 1957).

to correct arbitrary administrative action. Accordingly, categorical disclaimers of jurisdiction are now being construed as meaning that Commission action is not reviewable unless arbitrary. Thus, for example, Judge Swan who wrote *National Water Carriers, supra,* disavowing jurisdiction, stated in his dissent in *Long Island Rail Road, supra,* at p. 830, that Commission action is immune from court review "unless it has abused its discretion". And the majority in *Long Island Rail Road* referred to cases frequently cited as authority for non-reviewability [8] as authority, not for want of jurisdiction, but rather for the "long established rule" that

> "Under section 15(7), 49 U.S.C.A. § 15(7), the refusal or granting of suspension is a matter confided to the discretion of the Commission and no court has jurisdiction to review the Commission's decision unless it has refused to exercise discretion or has exercised it arbitrarily." (p. 827)

In *Amarillo-Borger, supra,* the court said of *Carlsen, Algoma, National Water Carriers,* all *supra,* and other cases:

> ". . . language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act . . . that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused." (138 F. Supp. 411, 416, n. 10).

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[8] *Board of Railroad Com'rs.* v. *Great Northern Ry. Co.*, 281 U.S. 412, 429 (1930); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (N.D. Ala. 1935); *Carlsen* v. *United States*, 107 F. Supp. 398 (S.D. N.Y. 1952); *National Water Carriers Association, supra.*

And the *Amarillo* court, analyzing the legislative history of section 10 of the Administrative Procedure Act, expressly rejected the view that the introduction (excepting from judicial review matters "by law committed to agency discretion") wholly insulates abuse of discretion from review. Holding that effect must be given to section 10(e), which directs the court to set aside "agency action . . . found to be . . . an abuse of discretion", the court said (p. 418):

> "But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U.S.C.A. § 1001(f), upon the basis of administrative expertise are precisely the matters which congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act".

Thus, the substantiality of the instant question is attested not only by its involvement in a growing number of cases and by wide spread judicial disagreement, but also by the nature of the question itself. Whether the courts are utterly without power to correct administrative abuse of discretion is an issue of the greatest importance under the Interstate Commerce Act, the Administrative Procedure Act, and indeed in the administration of justice.

The substantiality of the question of reviewability of the Commission's refusal to suspend has been urged by the Solicitor General. In *United States* v. *Amarillo-Borger Express*, 352 U.S. 817, the Commission's action in vacating a suspension had been held arbitrary and therefore reviewable, and at page 12 of his jurisdictional statement in that case, the Solicitor General said:

> "While the decision below deals immediately with an order of the Commission vacating its prior

> suspension order, its rationale appears to be equally applicable to orders originally suspending or refusing to suspend rates."

The same situation was presented in *United States* v. *Dixie Carriers*, 353 U.S. 906, and the Solicitor General relied on his prior jurisdictional statement in *Amarillo-Borger*.

And the fact that the Court recognized the substantiality of the questions by noting probable jurisdiction in both cases[9] would seem to be controlling here.

The Primary Jurisdiction Issue

The court below erroneously referred to the Commission, under the primary jurisdiction rule, an issue over which the Commission is without jurisdiction.

Railroads are not immune from the antitrust laws, *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945). Under the Bulwinkle Act (section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b) the Commission approved collective rate making procedures by these railroad defendants. But, as the court below recognized (p. 613 (Appendix A, *infra*, p. 15a)), the Commission did not and could not, under the Bulwinkle Act or any other authority, approve an agreement to destroy a competitor. *Atchison, T. & S. F. Ry. Co.* v. *Aircoach Transp. Assn.*, 253 F. 2d 877, 887 (D.C. Cir. 1958), where the Court of Appeals remanded to the district court for trial and decision the issue of the railroads' intent and purpose to destroy competition. In *Riss & Company* v. *Association of American Rail-*

[9] Both appeals eventually were dismissed as moot. 353 U.S. 1028 and 355 U.S. 179.

roads, 170 F. Supp. 354, 365 (D.C. 1959), Judge Sirica, commenting on the *Aircoach* decision, said:

> "On the second question, it was held in ACTA [*Aircoach*] that, under no circumstances could antitrust immunity under 49 U.S.C.A. § 5b(9) be held to apply to the use of approved procedures to set Section 22 rates if they were part of an effort by railroads in combination or conspiracy to eliminate the competition of Aircoach."[10]

The primary jurisdiction rule was thus inapplicable, and the reference of the antitrust issue to the Commission was an abdication by the court of jurisdiction that was exclusively its own. *Georgia* v. *Pennsylvania R. Co.*, *supra*, at p. 458.

The effect of the error was compounded by the fact that there could be no reasonable prospect of termination of the administrative process before the conspiracy had completed its destructive impact. The reference to the Commission was made on December 14, 1959, only ten months before the reduced rate would expire by its own terms. The result of invocation of the primary jurisdiction rule was to deprive the court of jurisdiction while giving the Commission jurisdiction that could not be effective.

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[10] In earlier phases of the *Riss* case, the Court of Appeals, in light of *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), had modified one of the rulings in its *Aircoach* decision which is not relevant to the instant issue. See 267 F. 2d 657 (D.C. Cir. 1958). Judge Sirica expressly pointed out that this modification did not affect what he referred to, in the quotation in the text, as the second question in *Aircoach*, saying, 170 F. Supp. at 365:

> "Thus, it would appear that the second holding of ACTA [Aircoach] stands unaffected by Isbrandtsen."

Judge Sirica's interpretation of *Aircoach* has remained undisturbed. See 267 F. 2d 659 (D.C. Cir. 1959).

The court erred further in dismissing the case rather than holding it on its docket pending administrative determination. As a result appellant was deprived of interim relief.

The court relied on *Far East Conference* v. *United States*, 342 U.S. 570 (1952) and even noted that in that case dismissal was held to be appropriate because no prejudice would result (179 F. Supp. at 613-614, Appendix A, *infra*, p. 16a). Here appellant had moved for an interlocutory injunction against the railroad defendants and its motion was denied for want not of merit, but of jurisdiction.

The dismissal was highly prejudicial and contrary to the teaching of *United States* v. *Western P. R. Co.*, 352 U.S. 59, 64 (1956); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940). As was said in *General American Tank Car* in which the court found that dismissal would have resulted in prejudice:

> "There should not be a dismissal, but, as in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247, 57 L. ed. 1472, 33 S. Ct. 916, supra, the cause should be held pending the conclusion of an appropriate administrative proceeding."

CONCLUSION

The questions presented by this appeal are substantial and of public importance and probable jurisdiction should be noted.

Respectfully submitted,

MARK P. SCHLEFER
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Attorneys for Luckenbach Steamship Company, Inc., Appellant.

April 9, 1960.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA
and
THE BALTIMORE AND OHIO RAILROAD COMPANY
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY
READING COMPANY
SOUTHERN PACIFIC COMPANY, and
TOLEDO, PEORIA & WESTERN RAILROAD COMPANY,
Defendants.

Civil Action No. 2144

S. Samuel Arsht and Andrew B. Kirkpatrick, Jr., (Morris, Nichols, Arsht & Tunnell) Wilmington, Del.; Mark P. Schlefer, John Cunningham and Israel Convisser (Kominers & Fort) Washington, D. C., for plaintiff.

Leonard G. Hagner, U. S. District Attorney, Wilmington, Del.; Robert A. Bicks, Acting Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D. C., for defendant, United States of America.

Robert W. Ginnane, General Counsel I.C.C. and H. Neil Garson, Associate General Counsel I.C.C. for the Interstate Commerce Commission.

William S. Potter and Henry R. Horsey (Berl, Potter and Anderson) Wilimington, Del.; Jeremiah C. Waterman and Edward M. Reidy, Washington, D. C.; Andrew C. Armstrong, Baltimore, Md., and Charles Burkett, San

Francisco, Cal., Attorneys for the above-listed Railroad defendants.

Charles McD. Gillan, Jr., Baltimore, Md., for Intervenor, North Atlantic Ports Conference.

Aaron Finger and E. Norman Veasey (Richards, Layton & Finger) Wilmington, Del.; Alvin J. Rockwell and Willis R. Deming (Brobek, Phleger & Harrison) San Francisco, Cal., and Washington, D. C., for Intervenor, Pacific American Steamship Association.

John P. Daley, Wilmington, Del., and Raymond A. Negus (Cake and Negus) Washington, D. C., for Intervenors, The Northwest Canners and Freezers Association, Inc., and Canners League of California.

William Prickett, Sr., and William Prickett, Jr., (Prickett & Prickett) Wilmington, Del., for defendants, Baltimore & Ohio Railroad Co., and Reading Company.

Before Biggs, Circuit Judge, and Wright and Rodney, *District Judges.*

Wright, *District Judge.*

This injunction action initiated by plaintiff, Luckenbach Steamship Company, Inc. (Luckenbach) against the United States and certain railroads, seeks: "(1) to enjoin, set aside, annul, suspend or rescind the action and order of the Interstate Commerce Commission, an agency of said defendant [United States], denying plaintiff's petition for suspension * * * of certain railroad rates published to become effective October 23, 1959," and "(2) to direct the said defendant [United States] through its agency the Commission, to suspend the operation of said rates;" and to direct the defendant railroads, "parties to such rates, to refrain from doing and/or continuing the actions and things herein complained of, designed (1) to monopolize the transportation of canned goods from Pacific origins

to Atlantic coast destinations and (2) to drive plaintiff from the business."[1]

On October 22, 1959 the District Court issued a temporary restraining order staying the action of the Interstate Commerce Commission (Commission) denying plaintiff's petition for suspension and ordering the Commission to suspend the proposed rail rate. Thereafter, a three-judge statutory court was convened pursuant to 28 U.S.C.A. §§ 2325 and 2284.

Jurisdiction is alleged under the provisions of 28 U.S.C.A. §§ 1336-1337, 1398, 2284 and 2321-2325; Section 10 of the Administrative Procedure Act (5 U.S.C.A. § 1009); Sections 1, 2 and 3 of the Sherman Act (15 U.S.C.A. §§ 1, 2, 3); and Sections 12 and 16 of the Clayton Act (15 U.S.C.A. §§ 22, 26).

The matters now before the court are plaintiff's motion for an interlocutory injunction and defendants' motion to dismiss the complaint and dissolve the temporary restraining order.

The essential allegations of plaintiff's complaint and amendment thereof to which defendants' dismissal motion is addressed may be summarized as follows:[2]

Luckenbach, the only general cargo carrier in the intercoastal trade, is the low cost carrier of canned goods. Its rate on this traffic, without which it cannot exist, fully covers cost plus a return. The proposed rail rate is below cost. Apart from its effect on Luckenbach, it will substantially reduce present railroad revenues now being earned on the large volume of canned goods moving by rail. The reduced rail rate will either deprive Luckenbach of its backbone traffic or force its rate to a point below cost, and drive the more efficient carrier out of the trade, exposing

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[1] Complaint.

[2] Luckenbach's Brief in Support of Motion for Interlocutory Injunction and In Opposition to Motion to Dismiss Complaint and Dissolve Restraining Order at pages 2-4.

the public to later rail rate increases. The railroads have expressly limited the rate reduction to a term of one year at the end of which the present rate will automatically be restored. The Commission ordered an investigation, thus placing upon the railroads the burden of sustaining it. But the investigation could be, and in the light of the injury to Luckenbach, probably would be nullified by the failure to suspend the rate. For if, upon conclusion of the investigation, the Commission should find that the rate was unlawful, the elimination of Luckenbach from the trade might make permanent and irremediable the interim violation of the National Transportation Policy and the Sherman Anti-Trust Act. The Commission's failure to suspend was inconsistent with its order of investigation. This was compounded by its silence as to its reasons.

Plaintiff asserts that the immediate consequences in permitting the proposed rail rate to become effective would be: "(1) to violate and frustrate the mandate of the National Transportation Policy, 49 U.S.C. preceding § 1; (2) to violate the Sherman Anti-Trust Act under the doctrine of *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945); and (3) to subject Luckenbach, a major water carrier under the Commission's jurisdiction, to immediate, incalculable and irreparable injury."[3]

The defendants have moved for dismissal on the ground that this court is without jurisdiction to review a Commission decision not to suspend the operation of new rate tariffs.

Plaintiff urges that Section 10(e) of the Administrative Procedure Act[4] plainly confers jurisdiction on the court to review the Commission's failure to suspend as it is authorized to do under Section 15(7) of the Interstate Commerce Act,[5] the material portion of which reads as follows:

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[3] *Ibid.*, p. 3.

[4] 5 U.S.C.A. § 1009(e).

[5] U.S.C.A. § 15(7).

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * *"

Section 10 of the Administrative Procedure Act[5] provides in part:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * * (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *"

The wording of the Administrative Procedure Act apparently makes no change in the law of reviewability. Section 10 is so worded that it is obvious that the introductory clause modifies each of the subsections. Thus agency action is left unreviewable if the statute precludes review or to the extent agency action is by law committed to agency discretion. These two reasons were the only ones precluding review of administrative action by the court before

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[5] 5 U.S.C.A. § 1009.

the Administrative Procedure Act was enacted and the wording of the Act has brought about no change.[7]

Whatever the scope of review of subsection (e)[8] is when read alone, the scope of review is certainly narrowed by that portion of the introductory clause, "Except so far as * * * (2) agency action is by law committed to agency discretion." Thus, although subsection (e) provides that the reviewing court shall set aside agency action[9] found, to be "arbitrary [or] capricious", it may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. So far as the action is by law committed to agency discretion it is not reviewable—even for arbitrariness or abuse of discretion. Whether or not agency action is reviewable, for a limited purpose or otherwise, depends upon what is committed by the statutes and common law to agency discretion.[10]

The Supreme Court in discussing the legislative history of the Act and how extensively, if at all, Section 10 changed the prior law on judicial review said:[11]

[7] See 4 Davis, Administrative Law Treatise, § 28.08 (1958).

[8] Subsection (e) [5 U.S.C.A. § 1009] in part reads as follows: "Scope of review (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed, and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *"

[9] Agency action is defined in the Administrative Procedure Act as including: "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." See 5 U.S.C.A. § 1001(g).

[10] 4 Davis, Administrative Law Treatise, § 28.16 (1958).

[11] Heikkila v. Barber, 345 U.S. 229, 233 (1953).

> * * * No easy answer is found in our decisions on the subject. Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it."

Section 15(7) of the present Transportation Act [12] authorizing the Commission to suspend rates, pending a hearing to determine the lawfulness of the filed rate was added to the original Interstate Commerce Act of February 4, 1887 by Act of June 18, 1910. [13]

Prior to the passage of the amendment several bills in equity had been filed in Federal courts seeking injunctive relief against the carriers to preclude the collection of the newly published rates, pending a full hearing before the Commission. Some courts held that a court of equity had the power to enjoin the collection of the new rates [14] and others held to the contrary. [15]

The reviewability of action of the Commission under the amendment in refusing to suspend rates pending hearing seems to have been raised for the first time in M. C. Kiser Co. v. Central of Georgia Ry. Co. [16] There the court stated:

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[12] 49 U.S.C.A. § 15(7).

[13] See historical note following 49 U.S.C.A. § 15(7).

[14] M. C. Kiser Co. v. Central of Georgia Ry Co. 158 F. 193 (Cir.Ct. N.D. Ga. 1907); Jewett Bros. v. Chicago, M. & St. P. Ry. Co. 156 F 160 (Cir.Ct. D. So. Dakota 1907); Northern Pacific Ry. Co. v. Pacific Lumber Mfgrs. Ass'n. 165 F. 1 (9 Cir. 1908).

[15] Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co. 178 F. 261 (4 Cir. 1910); Atlantic Coast Line R. Co. v. Macon Grocery Co. 166 F. 206 (5 Cir. 1909).

[16] 236 F. 573, 576 (D.S. S.D. Ga. 1916), affirmed 239 F. 718 (5 Cir. 1917).

"* * * The point here involved is whether this remedy is exclusive or not—whether it ousts the United States courts of their general equity jurisdiction on that particular subject. The court is inclined to think the intention of Congress was to make the remedy provided by the amendment exclusive. * * *"

Since then, a span of approximately forty-three years, whenever the reviewability of denial of a rate suspension by the Commission has been the issue, the courts have refused review.[17] Not always have the reasons for reviewability been the same,[18] but in every case review has been denied. The background against which the amendment was adopted and the wording of the amendment indicates Congress did not intend to bestow upon the court authority to review the denial of a suspension order. Prior to the amendment, the right to promulgate rates in the first instance rested with the carrier. The Interstate Commerce Act does not deprive the carrier of this initiative which was theirs at common law.[19] The Act generally contemplates the filing of new tariffs with the Commission prior to a hearing. The grant or denial of a suspension order is an interlocutory step preceding a hearing and decision as to the lawfulness of the proposed rate. It may be made pending a hearing on the merits and without the introduction of testimony.[20] The Act does provide that if a suspension order is granted reasons must be stated, but

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[17] Coastwise Line v. U. S. 157 F. Supp. 305 (D.C. N.D. Cal. 1957); National Water Carriers Ass'n. v. U. S. 126 F. Supp. 87 (D.C. S.D. N.Y. 1954); Carlsen v. U. S. 107 F. Supp. 398 (D.C. S.D. N.Y. 1952); Merchant Truckmen's Bureau v. U. S. 16 F. Supp 998 (D.C. S.D. N.Y. 1936); Algoma Coal & Coke Co. v. U. S. 11 F. Supp. 487 (D.C. E.D. Va. 1935).

[18] Note 17, supra, and cases cited therein.

[19] Algoma Coal & Coke Co. v. U. S. 11 F. Supp. 487, 493 (D.C. E.D. Va. 1935).

[20] Long Island Railroad Company v. U. S. 140 F. Supp. 823 (D.C. E.D. N.Y. 1956).

if denied no reason whatever need be stated.[21] Since the Act contemplates Commission action without a hearing the basis for decision, whether written reasons are required or not, is the expertise of the Commission in the field of transportation. The Act clearly contemplates, no hearing by the Commission before decision and requires no reason be given if it denies suspension. Review in this posture would, in effect, supercede agency functioning. The court is constrained, therefore, to hold that the denial of a suspension of a rate by the Commission is by law committed to agency discretion and therefore not reviewable.

There remains for disposition plaintiff's antitrust claim. Defendant's conduct cited as evidencing Sherman Act §§ 1 and 2 violations is set forth below:[22]

> "The railroads know, from Luckenbach's filed reports, the financial condition of the company and the fact that canned goods are vital to Luckenbach's business. Having already diverted a major part of this traffic to themselves by a previous rate cut, they now propose a further cut which will confront Luckenbach with two alternatives, both ruinous—to cut its rates below cost or to see all its canned goods traffic taken by the railroads. In either case Luckenbach cannot long remain in business, a result which the railroads have professed a determination to bring about. The proposed reduced rate terminates at the end of the year, when the present rate automatically again becomes effective. The reduced rate is below cost and will substantially reduce the revenue from the 62 percent of the canned goods traffic the railroads are carrying at the higher present rate."

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[21] "* * * While a suspension order must state reasons, the basis for the reasons we assume to be the expert knowledge of the members of the Suspension Board or the Division of the Commission, acting as an appellate division. This is not to be found however in the record of the proceedings before the Commission. Concededly it need not be recorded when suspension is denied, for then no reason whatever need be stated." *Long Island Railroad Company* v. *United States*, 140 F. Supp. 823, 827 (D.C. E.D. N.Y. 1956).

[22] Plaintiff's Memorandum of Law, p. 38.

Judicial cognizance of the above action is predicated upon two factors: [23]

(1) The independent applicability of the Sherman Act provision to regulate railroads remains unimpaired, for the I.C.C. has not been delegated power to enforce Sherman standards; and

(2) The provisions of the Interstate Commerce Act, authorizing the Commission to relieve carriers from anti-trust responsibility for collective rate-making procedures, does not immunize the so-called predatory practices alleged.

Conceding plaintiff's proffer for the purpose of discussion it does not resolve the fundamental issue presented, namely, the applicability of the primary jurisdiction doctrine. [24] Plaintiff misconceives the modern import of the concept. [25] The recent decisional law, in conjunction with

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[23] *Ibid.*, p. 39.

[24] "The doctrine of primary jurisdiction, or exclusive primary jurisdiction, or primary decision, or preliminary resort, or prior resort, is not a doctrine that governs judicial review of administrative action. In this important respect, it is altogether different from the doctrines of exhaustion and of ripeness, which govern the timing of judicial review of administrative action. The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.

* * *

"The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue. * * *" *3 Davis, Administrative Law Treatise*, § 19.01, pp. 1-3 (1958).

[25] "The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances. * * *" Citing *Federal Maritime Board* v. *Isbrandtsen Co.* 356 U.S. 481, 498-499 (1958).

the legal literature strongly urges where an administrative board, particularly knowledgeable in a specialized area, has been established, preliminary resort to the body should be had if some phase of the matter in litigation is within its exclusive jurisdiction.[26]

As observed by Mr. Justice Frankfurter in Far East Conference v. United States:[27]

> "* * * Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The requirement of preliminary resort to administrative boards is imperative to achieve maximum effectiveness from our judicial process. To bypass an agency peculiarly adapted in a particular field would be a complete economic and judicial waste. An integrated system necessitates that agency action precede court review where machinery has been created for this procedure. Especially is this true in the area of national transportation and other fully regulated industries.[28]

Application of the foregoing principles to the allegations of the complaint conclusively demonstrates the antitrust

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[26] Note 35, infra and accompanying text..

[27] 342 U.S. 570, 574-575 (1952).

[28] "* * * Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance." *United States* v. *R.C.A.* 358 U.S. 334, 348 (1959).

charges should be initially considered by the Commission. That the precise facts forming the basis of plaintiff's antitrust action are cognizable by the Commission is amply supported by plaintiff's showing before the Commission in the suspension proceeding. There, in an application designated "Protest and Petition for Suspension" at pages 9-10 plaintiff stated:[29]

> "IV. *Violation of the Antitrust Laws*
>
> "The proposed reduction is thus designed to eliminate the competition of Luckenbach—and is well calculated to that effect. When such a purpose is effected through collective rate-making procedures and action —otherwise exempt—they violate sections 1 and 2 of the Sherman Antitrust Act."

The National Transportation Policy required to be considered by the Commission provides in part:[30]

> "'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, * * *
>
> * * *
>
> "'to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *
>
> * * *
>
> "'All of the provisions of this Act * * * shall be administered and enforced with a view to carrying out the above declaration of policy.'"

Plaintiff's assertion that the railroads predatory practices violate, inter alia, the aforementioned provision, additionally forms the basis for its charge that defendants

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[29] Document styled "Protest and Petition for Suspension" attached to the complaint.

[30] 49 U.S.C.A. Historical Note preceding § 1.

wrongfully attempt to monopolize "a part of the trade or commerce among the several States".[31]

Plaintiff seeks not only antitrust relief against defendant railroads but also against the Commission for it is the final action of the Commission in permitting the rates to become effective that is injurious to plaintiff.[32] Thus, if

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[31] Complaint, allegation 19.

[32] Plaintiff's Reply Brief at page 3 states:

"Insofar as relief is sought against the Interstate Commerce Commission on anti-trust grounds, the basis for jurisdiction in this panel is clear. Commission action is the *sine qua non* for effectuating the anti-trust violation. The Commission's imprimatur is an essential prerequisite to the proposed reduction by which the roads seek plaintiff's destruction. Fully informed that its action will have this effect, the Commission has, nevertheless, persisted in its position. When, as here, an agency of the government permits its sanctions to be used to consummate a violation of the anti-trust laws, it is not beyond the judicial reach."

And on pages 86-87 of the Transcript of the Oral Argument the following colloquy between court and counsel for plaintiff appears:

"JUDGE WRIGHT: Suppose you just wanted to restrain the Railroads from exercising the right given them by the Commission, I.C.C. law, to make these rates effective, would that not have been a one-judge matter which would come up under the Clayton Act, anti-trust laws?

"MR. KIRKPATRICK: If our relief were sought solely against the Railroads, then I would have thought that a one-judge court could have heard the matter.

"JUDGE WRIGHT: It is your position, under the anti-trust theory, that you are entitled to any relief at all against the I.C.C.?

"MR. KIRKPATRICK: Yes, sir, very definitely.

"JUDGE BIGGS: Do you assert that the I.C.C. is in an illegal combination with the Railroads?

"MR. KIRKPATRICK: Our theory is that the action of the I.C.C. here is really the last link in the chain by which this anti-trust violation will be consummated. Here is the point: As I understand it, the rate, which the Railroads propose, cannot be made effective except by a filing with the Commission and Commission action permitting it to become

the rates be finally declared contrary to the National Transportation policy, then the purported conspiratorial action will have been thwarted.

Paramount in this determination inviting the Commission to initially rule on the instant claims is the fact that defendant railroads are operating pursuant to § 5(a) antitrust exemption agreements.[33] Section 5(a) supersedes the Sherman Act to the extent that the Approved agreement is immunized from Sherman Act proscriptions;[34] and

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effective. Unless that is done the rate cannot be charged. When the rate is filed with the Commission, the Commission permits it to become effective, then that becomes the only legal rate. It acquires statutory force, and it is the only rate which the carriers can lawfully collect or the shippers can properly pay. Consequently, Commission action is really the last step in this whole thing. If the rate did not go into effect by virtue of Commission processes, then we would not be hurt and would not be before your Honors this afternoon."

Chief Judge Biggs and I construe the broad allegations of the complaint, together with counsel for plaintiff's aforementioned remarks as enunciating an antitrust cause of action against the Commission. We find it unnecessary in view of the final determination to pass on whether an agency of the United States can be made a party defendant in a private antitrust action.

[33] "The railroad defendants engage, together with virtually all other United States and some Canadian railroads, in collective ratemaking under agreements approved by the Interstate Commerce Commission under section 5a of the Interstate Commerce Act (49 U.S.C. § 5b)." Complaint, allegation 6.

[34] 49 U.S.C.A. § 5(b) provides in relevant part:

[¶2] "Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Com-

since Section 5(a) is administered by the Commission it is incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption. The exemption certainly does not sterilize all forms of conspiratorial action, however, to foster an orderly administration of the immunization provision requires, at the minimum, primary construction by the Commission.

Professor Davis in his Administrative Law Treatise suggests that under the circumstances presented, initial resort to the administrative agency is indicated: [35]

> "(1) On the question whether the doctrine applies to problems or relief which are beyond administrative jurisdiction, the theory seems reasonably clear. The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—to assure that the agency will not be

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mission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph."

[¶9] "Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the anti-trust laws with respect to the making of such agreement, and with repect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

[35] 3 Davis, Administrative Law Treatise, § 19.07, p. 39 (1958).

> by-passed on what is especially committed to it—and because resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought."

The principle enunciated by Professor Davis is eminently sound. Accordingly, plaintiff is required to address these antitrust charges in the first instance to the Commission.

The sole question remaining is whether to dismiss or retain jurisdiction of the antitrust charges. The preferred procedure is to dismiss. As observed by the Supreme Court:[36]

> "We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceedings before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed. * * *"

Defendants have questioned the jurisdiction and propriety of the statutory three-judge court acting upon the antitrust claim. The antitrust cause and the action to review are so inextricably enmeshed that it would be unwarranted to truncate the litigation at this juncture. To refer the antitrust phase to the district court would require different reviewing tribunals to initially rule on the respective phases of this determination.[37]

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[36] Far East Conference v. United States, 342 U.S. 570, 577 (1952).

[37] 28 U.S.C.A. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by

Against this background, and in view of the ancillary nature of the antitrust charges, Chief Judge Biggs and I are in accord that the presently constituted court has jurisdiction in the premises.

The complaint will be dismissed. An order to such effect is filed concurrently with this opinion.

RODNEY, *District Judge*, concurring in part, dissenting in part.

I am in entire accord with most of the conclusions herein reached. I agree that, under existing provisions of law and procedure, where change of rate of transportation is considered by the carrier, it is the duty of the carrier, intending such change, to file the proposed new rates with the Interstate Commerce Commission. Upon a protest being filed, it becomes the duty of the Interstate Commerce Commission to determine the lawfulness of the new rates. In doing this the Commission may, but need not, order a suspension of the new rates until final hearing. If suspension is ordered, reasons for the action by the Commission must be assigned. If no suspension of the new rates is ordered by the Commission, no order is signed and, under

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any Act of Congress to be heard and determined by a district court of three judges."

This section applies wherein either an interlocutory or permanent injunction is sought to restrain the enforcement, operation or execution, in whole or in part of any order of the Interstate Commerce Commission "other than for the payment of money or the collection of fines, penalties and forfeitures." 28 U.S.C.A. §§ 2321, 2325.

Appeal from the decision of the United States District Court for the District of Delaware sitting as a one judge court dismissing an antitrust claim as herein alleged would be pursuant to 28 U.S.C.A. § 1291 which states:

"The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

the weight of authority, no reasons need be assigned for such refusal.

The failure or refusal of the Interstate Commerce Commission to suspend the operation of the new rates as in this case until final hearing is, I agree, an exercise of discretion vested in such Commission and since the discretion has been exercised then under the provisions of the Administrative Procedure Act (5 U.S.C. § 1009 (e)) it is excluded as to reviewability. So much for the relief sought against the Interstate Commerce Commission by injunction.

The complaint also states a claim against the defendant railroads and others acting in combination with them under the antitrust laws. The majority opinion finds that the doctrine of Primary Jurisdiction requires that this matter be first considered by the Interstate Commerce Commission and dismisses the plaintiff's claim as arising from the violation of the antitrust laws upon that basis. It is not the conclusion that the Primary Jurisdiction with reference to some features of the antitrust laws rests with the Interstate Commerce Commission to which I object for I do not reach that question. I question whether the special three-judge court should determine this matter or whether it should be determined by the district court as normally constituted, and with which this case was originally filed.

The three-judge court is somewhat of an anomaly. It is a federal district court consisting at times of three judges instead of one. It is of purely statutory origin and intended for distinct and limited purposes.

Starting as an expediting provision in 1903 with reference to certain antitrust cases and as insuring direct review by the Supreme Court (32 Stat. 823) the three-judge court has been made applicable to several situations. Among these were suits to annul, set aside or restrain orders of the Interstate Commerce Commission and matters concerning the constitutionality of the state statutes or administrative orders. In these latter instances the re-

quirement of a three-judge court is inextricably and almost universally interwoven with the matter of injunction and the disinclination to allow the issuance or refusal of an injunction in certain cases to be determined by one judge. So it is that by 28 U.S.C. § 2325 any injunction restraining the enforcement operation or execution, in whole or in part, of any order of the Interstate Commerce Commission will be determined by a three-judge court under 28. U.S.C. § 2284.

It will be borne in mind that it is not every proceeding to review an order or action of the Interstate Commerce Commission that requires a three-judge court. While every action to enforce, annul or set aside an order of the Interstate Commerce Commission is required by 28 U.S.C. § 2321 to be taken under the provision of Chapter 157 of Title 28, yet the bringing of such action does not operate of itself to require a three-judge court or to operate as a stay or suspend the order of the Interstate Commerce Commission and if no request is made for a stay or suspension of the order of the Interstate Commerce Commission the case would remain in the district court as normally constituted.

It is only under Section 2325 the three-judge court comes into existence. If an interlocutory or permanent injunction restraining the enforcement of the order of the Interstate Commerce Commission is requested, then and only then does the three-judge court come into existence.

In the present proceedings and insofar as the antitrust claim is concerned, no injunction against the Interstate Commerce Commission with reference to the antitrust claim is suggested in the complaint nor mentioned in the relief sought. It is true that in the briefs the plaintiff seeks to consider the action of the Commission in refusing to suspend the proposed rates as constituting an effective step in the antitrust claim, but no injunction is considered in the complaint with reference to that claim.

Although neither the complaint in this case nor the prayers for relief mention the Interstate Commerce Commission with reference to the antitrust claim, yet the majority of this Court considers that the Interstate Commerce Commission is claimed by the plaintiff with participating in some way in the antitrust violation. Whether the Commission be considered an active participant in the antitrust claim and therefor essentially as a defendant, or whether the non-action of the Commission merely furnished the means by which the railroads may be charged with violation of the antitrust laws, then in neither case do I see any jurisdiction in a three-judge court since no injunctive relief is involved in any way.

I am of the opinion that the three-judge court as such has only such jurisdiction as is expressly given to it by statute and does not have jurisdiction to determine either the merits of the antitrust claim nor to dismiss the antitrust claim under the Primary Jurisdiction principle. I think that all questions as to the antitrust claim should be considered by the district court as normally constituted and as embracing the residuum of the claim of the plaintiff not cognizable by the three-judge court. A portion of the complaint not cognizable by a three-judge court may, I think, be segregated from that part coming within the jurisdiction of such three-judge court. [1]

At Wilmington,

December 14, 1959

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[1] Shippers' Car Supply Com. v. Interstate Commerce Comm., 160 F. Supp. 939, 948 (D.C. D. Oreg. 1958).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Buckenbach Steamship Company, Inc.,
Plaintiff,

v.

United States of America,
and
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Denver and Rio Grande Western Railroad Company
The Pennsylvania Railroad Company
Reading Company
Southern Pacific Company, and
Toledo, Peoria & Western Railroad Company,
Defendants.

Civil Action No. 2144

Order

And now, to-wit, this fourteenth day of December, 1959, It Is Ordered that the complaint in the above entitled case be and the same is hereby dismissed.

By the Court,

Caleb M. Wright
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
and
THE BALTIMORE AND OHIO RAILROAD COMPANY
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY
READING COMPANY
SOUTHERN PACIFIC COMPANY, and
TOLEDO, PEORIA & WESTERN RAILROAD COMPANY,
Defendants.

Civil Action No. 2144

Order

AND NOW, TO-WIT, this 15th day of December, 1959 "Plaintiff's Motion for Rehearing and to Vacate or Stay Order Dismissing Complaint" having been filed and considered by the court,

IT IS ORDERED, that said motion be and the same is hereby denied; and

IT IS FURTHER ORDERED, that the effectiveness of this court's order of December 14, 1959 be and the same is hereby suspended to and including December 22, 1959, to enable plaintiff to apply to the Supreme Court of the United States or a Justice thereof for any appropriate relief. Provided, that if no action be taken by the Supreme Court or any Justice thereof on or before December 22, 1959, the order of this court of December 14, 1959 shall become effective.

John Biggs, Jr.
J.

Caleb M. Wright
J.

Richard S. Rodney
J.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2 acting as an Appellate Division, held at its office in Washington, D. C., on the 22nd day of October, A. D. 1959.

NO. 33234

CANNED GOODS—PACIFIC COAST TO EASTERN POINTS

There being under consideration the matter of rates and charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of canned or preserved food-stuffs, in carloads, from Pacific Coast origins to eastern transcontinental destinations, as set forth in the following schedules:

TRANS-CONTINENTAL FREIGHT BUREAU, Agent, I.C.C. 1612:

In SUPPLEMENT 31, on page 12, in ITEM 4140-F, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Groups A and A-1 Rates;

In SUPPLEMENT 34, on page 12, in ITEM 4140-G, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Groups A and A-1 Rates;

In SUPPLEMENT 35, on page 44, in ITEM 4140-H, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Groups A and A-1 Rates;

In SUPPLEMENT 38, on page 6, in ITEM 4140-I, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Groups A and A-1 Rates;

or as the same may be amended or reissued;

It appearing, That upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and

charges, rules, regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the said schedules, be, and they are hereby, made respondents to this proceeding and that a copy of this order be served upon the said respondents; and that notice of this proceeding be given to the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2 acting as an Appellate Division.

Harold D. McCoy,
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D. C.

Susp.-21324
October 22, 1959

NOTICE:

Division 2 acting as an Appellate division, voted today not to suspend protested schedules naming new and reduced all-rail commodity rates on canned or preserved foodstuffs, minima 40,000 and 75,000 pounds, from Pacific Coast origins to transcontinental destinations in Groups A, A-1, B, B-1 and C, published in Supplements 31, 34 and 35 to I.C.C. 1612 of Trans-Continental Freight Bureau, Agent, to become effective October 23, 1959, but to investigate only the 174-cent rate to groups A and A-1, in Docket No. 33234, *Canned Goods—Pacific Coast to East.*

The Board of Suspension had concluded not to suspend the protested schedules and the action of Division 2 followed the filing of an appeal for reconsideration of the Board's action.

Harold D. McCoy,
Secretary

Order

INVESTIGATION AND SUSPENSION DOCKET NO. 7259
CANNED GOODS—PACIFIC COAST TO EAST

PRESENT: Anthony F. Arpaia, Acting Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth rates and charges, and rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 23, 1959, and later, designated as follows:

TRANS-CONTINENTAL FREIGHT BUREAU, Agent, I.C.C. 1612:

In SUPPLEMENT 31, on page 12, in ITEM 4140-F, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Group A Rates;

In SUPPLEMENT 34, on page 12, in ITEM 4140-G, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Group A Rates;

In SUPPLEMENT 35, on page 44, in ITEM 4140-H, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Group A Rates;

In SUPPLEMENT 38, on page 6, in ITEM 4140-I, the rate of 174 cents subject to a minimum weight of 75,000 pounds, insofar as it would apply to points taking Group A Rates;

It is ordered, That solely in obedience to the temporary restraining order issued by the United States District Court for the District of Delaware, Judge Caleb M. Wright, in *Luckenbach Steamship Company, Inc.*, v. *United States of America*, et al, Civil Action No. 2144, at 4:45 P.M. on October 22, 1959, the operation of the said schedules contained in said tariffs and supplements thereto, be, and they are hereby, suspended until further order of the Commission.

It is further ordered, That the rates and charges, regulations and practices thereby sought to be altered shall not be changed unless authorized by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to said schedules.

Dated at Washington, D. C., this 23rd day of October, A.D., 1959.

By the Commission, Acting Chairman.

Harold D. McCoy,
Secretary

(SEAL)

APPENDIX B

STATUTES INVOLVED

Interstate Commerce Act. Sec. 15(7) (49 U.S.C. § 15(7))

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specify-

ing by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Administrative Procedure Act, Sec. 10(e) (5 U.S.C. § 1009(e))

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * * *

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6)

unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Sherman Act: Sections 1 and 3
15 U.S.C. §§ 1, 3

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful, any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of

this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * * * * * * *

3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Act, Section 16
15 U.S.C. § 26

16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That noth-

ing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

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MAY 10 1960
JAMES R. BROWNING, Clerk

No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1959

LUCKENBACH STEAMSHIP COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment entered on December 14, 1959, by a three judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a complaint seeking (1) to compel the Interstate Commerce Commission to exercise its discretionary authority under section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), and to suspend the

[1] The district court's opinion is reported at 179 F. Supp. 605.

operation of new tariff schedules containing reduced rail rates on canned goods from the Pacific Coast to all transcontinental destinations generally located in that part of the United States east of Illinois and north of North Carolina; and (2) to direct the rail carrier defendants, parties to the rates, to refrain from monopolistic practices designed to drive appellant out of business. (J. St. 2a–3a.)

The reduced rail rates were filed with the Commission on or about September 16, 1959, and were scheduled to become effective on October 23, 1959. On October 12, 1959, Luckenbach Steamship Company, Inc., the appellant, filed a protest against the new rates with the Commission. In its protest, Luckenbach requested the Commission to investigate the lawfulness of the new rates and, pending investigation, to suspend them. The rail carriers replied on October 19, 1959. Thereafter the matter was referred for initial disposition to the Commission's Board of Suspension.[2] On October 20, 1959, the Board voted not to suspend the rates. Subsequently, on appeal to Appellate Division 2 of the Commission, an order was entered on October 22, 1959, instituting an investigation into the rates. (J. St. 23a–24a.) The Appellate Division, however, voted not to suspend the protested schedules. (J. St. 25a.)

Thereafter, the appellant, on October 22, 1959, instituted an action in the district court seeking to compel

[2] A Board of five employees of the Commission constituted pursuant to section 17(2) of the Interstate Commerce Act, 49 U.S.C. section 17(2), to take initial action on protests and requests for suspension of rates.

the Commission to suspend the rates under investigation and also to compel the rail carriers to refrain from engaging in monopolistic practices designed to drive it out of business.[3] The district court unanimously held that the refusal of the Commission to suspend the operation of a new rate was a matter within the Commission's discretion and, therefore, not judicially reviewable (J. St. 9a). A majority of the district court was also of the view that the charges made in the complaint that the railroads had filed the rates pursuant to a conspiracy violative of the antitrust laws were "so inextricably enmeshed" with the question of the legality of these charges under the provisions of the Interstate Commerce Act that the antitrust charges were within the court's jurisdiction, but that the Commission had primary jurisdiction (J. St. 16a). The same majority ruled that, in these circumstances, dismissal of the complaint, rather than retention of jurisdiction and reference of the antitrust phase of the complaint to an ordinary district court, was the preferable and appropriate procedure (*id.* 16a–17a).[4]

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[3] On the same date Judge Caleb M. Wright, over the objections of the present appellees, issued a temporary restraining order requiring the Commission to suspend the challenged rates, and the Commission, in compliance with the court order, thereupon entered an order suspending the assailed rates (J. St. 26a).

[4] On December 15, 1959, the day after the district court entered its judgment dismissing the complaint, it suspended the effectiveness of its decision to and including December 22, to enable the plaintiff to apply to this Court or to a Justice thereof "for any appropriate relief." On December 22, 1959, Mr. Justice Brennan denied the appellant's application for a stay of the judgment

Since the assailed rail rates were filed to become effective October 23, 1959, and since § 15(7) of the Act, 49 U.S.C. 15(17), gives the Commission power to suspend a "new" rate for a period not longer than "seven months beyond the time when it [the rate] would otherwise go into effect," the Commission's power of suspension will expire on May 23, 1960, thus rendering the matter moot.

ARGUMENT

1. Contrary to the allegation of the appellant (J. St. 6), there is no conflict of decision regarding the reviewability of the Commission's action in declining to suspend the operation of new rates. The cases cited by the appellant (J. St. 6, fn. 6) to support its allegation that the courts are divided on this question of reviewability are not applicable to the precise issue here. Thus, *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N.D. Tex.), dismissed as moot, 352 U.S. 1028; *Long Island Rail Road Company* v. *United States*, 140 F. Supp. 823 (E.D.N.Y.); and *Dixie Carriers* v. *United States*, 143 F. Supp. 844 (S.D. Tex.), dismissed as moot, 355 U.S. 179, involved situations in which the plaintiffs challenged the validity of an order of the Commission *vacating* a prior order of suspension and sought *reinstatement* of the rate suspension orders. It is submitted that these cases do not support the reviewability of the order which is here in issue.

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below pending determination of its contemplated appeal to this Court. Following this action, the rail rates went into effect on January 9, 1960.

The appellant also cites *Seatrain Lines* v. *United States*, 168 F. Supp. 319 (S.D. N.Y.), and *Marine Transport Lines* v. *United States*, 173 F. Supp. 326 (D. D.C.). In these cases the district courts held invalid, for insufficient findings, orders of the Commission which granted certain rail carriers relief from the long and short-haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. 4. The district courts remanded the cases to the Commission and required that it suspend the operation of the challenged rates. Thus these cases also do not support the appellant's contention that the courts have reviewed the action of the Commission in declining to suspend rates. In this connection, the district court below accurately held (J. St. 8a) that:

> Since then [*M. C. Kiser Co.* v. *Central of Georgia Railway Co.* 236 Fed. 573, 576 (1916), affirmed, 239 Fed. 718] a span of approximately forty-three years, whenever the reviewability of denial of a rate suspension by the Commission has been the issue, the courts have refused review.

Apparently the appellant would base its appeal upon that portion of the opinion below (J. St. 6a) which holds unreviewable agency action which, by law, is committed to an agency's discretion "even for arbitrariness or abuse of discretion." However, the district court did not so characterize the Commission's action in the instant case, and there is no reason to assume that the Commission's action was, in fact, arbitrary and an abuse of its discretion.

It is submitted that the district court correctly concluded that (J. St. 9a):

> * * * The Act clearly contemplates, no hearing by the Commission before decision and requires no reason be given if it denies suspension. Review in this posture would, in effect, supersede agency functioning. * * * [t]he denial of a suspension of a rate by the Commission is by law committed to agency discretion and therefore not reviewable.

2. The appellant contends that the Commission has no jurisdiction over the antitrust charges made in its complaint, and that the district court therefore erred in referring these charges to the Commission (J. St. 9). The case, however, does not require resolution of this matter. While the district court expressed the opinion that the Commission, in determining the lawfulness of the new railroads' rates, would have to consider the complaint allegations as to "predatory practices" and "conspiratorial action" (J. St. 12a-15a), the judgment entered by the court does not remand the cause to the Commission for further proceedings; it merely dismisses the complaint (*id.* 21a). Under the judgment, the appellant is left free to bring an action under § 16 of the Clayton Act, 15 U.S.C. 26, to enjoin the railroads' alleged violation of the antitrust laws. It is also left free to bring an action under § 4 of the Clayton Act, 15 U.S.C. 15, for triple the damages caused by the railroads' alleged antitrust violations. Jurisdiction of such actions is vested in ordinary one-judge district courts, which are empowered to take evidence and make factual

determinations based thereon. Such actions are wholly outside the jurisdiction of specially constituted three-judge district courts, whose authority is limited to review of the validity of orders of the Interstate Commerce Commission, solely on the basis of the proceedings before the Commission.

Even if such a three-judge district court has discretionary power to transfer to a one-judge district court a portion of a complaint which attacks a Commission order,[5] outright dismissal of the complaint certainly is not an abuse of discretion. See *Far East Conference* v. *United States*, 342 U.S. 570, 577. The effect of dismissal is merely to require the plaintiff, if it wishes an adjudication of its antitrust claims, to initiate an independent Clayton Act suit. We therefore submit that the second and third questions presented by the appellant (J. St. 3) raise no substantial issue warranting review by this Court. We further suggest that there is no sound foundation for review of these questions by this Court since they are ancillary to the action to set aside a Commission order, which is about to become moot (see *supra*, p. 4).

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[5] See *Shippers' Car Supply Committee* v. *I.C.C.*, 160 F. Supp. 939, 943 (D. Oreg.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question and that the judgment of the district court should be affirmed.*

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MAY 1960.

---

* If the Court's action in this case is taken after May 23, 1960, when the case will become moot (see p. 4, *supra*), the judgment should be vacated and the case remanded to the district court with directions to dismiss the complaint. *Amarillo-Borger Express* v. *United States*, *supra*, 352 U.S. 1028; *A., T. & S.F. R. Co.* v. *Dixie Carriers*, 355 U.S. 179.

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MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

No. 848

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court, District of Delaware

MOTION TO AFFIRM

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No. 848

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UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court, District of Delaware

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellee railroads, The Baltimore and Ohio Railroad Company, Chicago, Rock Island and Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, The Pennsylvania Railroad Company, Reading Company, Southern Pacific Company, Toledo, Peoria & Western Railroad Company, Canners League of California, and Northwest Canners and Freezers Association, Inc., move that the judgment of the district court be affirmed on the ground that the appeal presents no substantial question warranting further argument.

STATEMENT

This is a direct appeal from an order entered December 14, 1959, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a

complaint which sought to compel the Interstate Commerce Commission to suspend certain reduced rates proposed by the carriers to become effective October 23, 1959 (R. 332). These carriers proposed, on statutory notice, effective on that date, to reduce their all-rail commodity rates on canned or preserved foodstuffs from Pacific Coast origins to destinations in the East (R. A. 130, 131).* Any suspension granted would expire May 23, 1960, i.e. seven months after the rate was to become effective, 49 U.S.C.A. Sec. 15(7).

The proposed reduction originated at a meeting called by shippers in April, 1958 to consider the need for a rate readjustment (R. A. 106).

While the rate proposed, $1.74 per 100 pounds, was lower than the prior minimum rate of $1.94, it was to be effective only as to shipments of a higher minimum weight of 75,000 pounds per car as compared with 60,000 pounds under the $1.94 rate. (R. A. 132). Because of the requirement of a higher weight per car, the carriers' revenues on the traffic would not be adversely affected by the lower rate (R. A. 134, 135). The new rate was fully compensatory, since from San Francisco to New York, the principal eastern destination, it would, according to studies made, produce revenues at least 46% in excess of the cost of transporting the traffic (R. A. 134, 135).

Under the Commission's procedure, protests to the proposed reductions were filed with the Commission by appellant, by competing steamship companies, and by others, alleging probable loss of traffic as a result of the reductions (R. A. 174, et seq.). Replies to these protests, setting forth facts in support of the new rate,

* Record references prefixed "A" are to documents in the Interstate Commerce Commission record filed with this Court but bound separately from the District Court record and listed as Item No. 40.

were filed in behalf of the rail carriers and the shippers of the bulk[†] of the canned goods from the Pacific Coast and in the Northwest (R. A. 99 to 145). These protests and replies set forth the facts upon which the opponents and proponents of the new rate relied, and constitute the evidence in the case.* After consideration of such evidence, the Board of Suspension of the Commission declined to suspend the proposed rate of $1.74. An appeal was taken from this action, as permitted by the Commission's regulations, to Division 2 of the Commission. That Division, after consideration of the same evidence (all of which is before this Court), (R. Item No. 40) affirmed the action of the Board of Suspension in declining to suspend, but at the same time, as is often its practice, instituted an investigation into the reasonableness of the rates (Order of October 23, 1959, in Docket No. 33234, *Canned Goods—Pacific Coast to the East*, [R. A. 171]). Following the Commission's order instituting the investigation, hearings in the proceedings were held at San Francisco, California, on January 25 to 29, 1960, inclusive, and at Washington, D. C., on March 21 to 25, 1960, and April 4, 1960. The investigation has not yet been submitted, as appellant Luckenbach has during the last three weeks been pursuing discovery procedures which it requested of the Commission. Further hearings are therefore possible before the record before the Commission will be closed.

On application to the District Court, the District Judge entered a temporary restraining order on October 22, 1959, prohibiting the establishment of the proposed rate pending the hearing and decision of the

[†] The shippers supporting the new rate produce 80% of the total canned goods production on the Pacific Coast (R.A. 105, 106).

* General Rules of Practice, I.C.C., 49 C.F.R. 1.200

matter by a statutory three-judge court. That court, consisting of Court of Appeals Judge Biggs and District Judges Wright and Rodney, after full consideration and argument, by order entered December 14 1959, sustained the refusal of the Commission to suspend the rate and dismissed the complaint (R. 332), but stayed the effect of its order for a short period to enable the presentation to this Court of an application for a stay (R. 335). The latter application was denied by Mr. Justice Brennan on December 22, 1959. This appeal was taken from the District Court's order of December 14, 1959, and appellant's jurisdictional statement was filed on April 9, 1960, and copy received by appellees on April 11, 1960.

ARGUMENT

The Commission's refusal to exercise its power temporarily to suspend a reduced rate is not reviewable

It is well settled that the refusal of the Commission to exercise its discretionary power to suspend a reduced rate for a stated period is not a subject for judicial review. This Court has so held. Chief Justice Hughes, speaking for the Court in *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Company*, 281 U.S. 412, 429 (1930), said:

> "* * * Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, Sec. 15(7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only. * * *"

A long line of decisions of the District Court are to the same effect. *Algoma Coal & Coke Co.* v. *United States, et al.*, 11 F. Supp. 487 (N.D. Ala. 1935); *M. C. Kisig Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S.D. Ga. 1916), (aff'd 239 F. 718); *Carlson* v. *United States*, 107 F. Supp. 398 (S.D. N.Y. 1952); *Manhattan Transit Co., Inc.* v. *United States, et al.*, 24 F. Supp. 174 (Mass. 1938), and cases there cited; *Coastwise Lines* v. *United States*, 157 F. Supp. 305 (N.D. Cal. 1957), *National Water Carriers Association* v. *United States*, 126 F. Supp. 87 (S.D. N.Y. 1954). Only recently (March 28, 1960) a three-judge District Court for the Northern District of Ohio, Eastern Division, in *Bison Steamship Corp.* v. *United States* (Civil Action No. 35783), after reviewing a number of authorities, held that the proposition that, in the absence of special circumstances, the Commission's refusal to suspend was not reviewable "is so overwhelming that any serious argument to the contrary would be legally implausible."

Appellant erroneously asserts in its jurisdictional statement (p. 5) that there is "a deep split" among three-judge courts on this question. It refers (p. 6, note 6) to several cases as being at variance with the rule set forth by us above. However, none of the cases cited by appellant, headed by *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N.D. Tex. 1956), support its assertion, since none are holdings on the question at issue here, i.e., the reviewability of the *mere refusal to suspend* a new rate. *Amarillo-Borger, Long Island Rail Road Company* v. *United States*, 140 F. Supp. 823 (E.D. N.Y. 1956), and *Dixie Carriers* v. *United States*, 143 F. Supp. 844 (S.D. Tex. 1956), all dealt with appeals from *orders* by the Commission

reinstating a rate previously suspended. *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y. 1958), involved a Commission order granting a Fourth Section application and permitting a reduced rate to go into effect. The Court merely held that where the rate was *concededly unlawful*, suspension could be directed. *Marine Transport Lines, Inc.* v. *United States*, 173 F. Supp. 326 (D.C. 1959), did not even consider the matter of the Commission's suspension powers but merely enjoined and annulled an order granting Fourth Section relief as improperly granted.

Such cases thus involve entirely different issues from that of mere refusal to exercise the temporary power to suspend a rate for seven months. In enacting Section 15(7) of the Interstate Commerce Act, Congress specifically committed to Commission discretion the right temporarily to suspend a rate. Where such action is so committed to agency discretion, the Administrative Procedure Act does not permit review (Adm. Proc. Act, Section 10, 5 U.S.C.A. Section 1009). *State of New Jersey* v. *United States*, 168 F. Supp. 324, 326 (N.J. 1958), affirmed *per curiam* 329 U.S. 27 (1959); *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309 (1958). Preliminary agency action such as is involved here is reviewable only upon the review of final administrative action. *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 499 (1955).

The action is premature and for that reason judicial review is not proper at this time

As pointed out above, although the Commission declined to suspend the proposed rate, it issued an order directing that an investigation be held into the reason-

ableness of such rate. Hearings have been conducted and additional hearings may be held pursuant to that order, as set out above in this motion. At such hearings, evidence concerning all issues pertinent to the establishment of the new rate may be introduced, including evidence relating to the appellant's antitrust allegations. When such administrative proceedings are completed and a decision rendered, any party dissatisfied with the decision of the Commission may then seek judicial review of that action. Until that time, any such review by the courts is premature.

If, on the basis of the full hearings in its investigation of the rate, the Commission should find the rate to be unreasonable, any necessity for appellant's application to this Court for relief would be eliminated. This Court only recently had an analogous situation before it, and dismissed the appeal as premature. In the litigation growing out of the Commission's *per diem* decision, *Boston & Maine Railroad Co.* v. *United States*, 358 U.S. 68 (1958), the Court said:

> "In its memorandum before this Court, the Commission has expressed its readiness to 'proceed in accordance with the terms of the remand.' As a result we find the question raised by No. 310—whether the Commission has adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or must engage in what the District Court characterized as the 'full scale investigation' accompanying promulgation of a rule under Section 1(14)(a)—prematurely presented for decision. The Commission here recognizes that 'further investigation' and 'more detailed findings' will be requisite to compliance with the District Court's remand. Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embrac-

ing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate. If, conversely, the Commission adheres to its original view, it will be in the light of new findings derived from its further investigation. In either event, the proceedings on remand may lose the characteristics of a Section 5(d) declaration and take on those of a Section 1(14)(a) rule-making procedure, thereby causing the question now sought to be reviewed to disappear. As the Commission has appropriately observed, the record now presents what is essentially only 'an interim ruling.'

"These considerations lead us to dismiss the appeal in No. 310 without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings."

Until the Commission, in the investigation it has ordered, has heard all the evidence and made a decision, it has entered no order such as would be subject to review by this Court. The mere refusal to exercise its discretionary power temporarily to suspend the rate pending investigation is not an order subject to review. In *Carlsen, et al.* v. *United States, et al.*, 107 F. Supp. 398 (D.C. S.D. N.Y.), a three-judge statutory court said:

"Whenever a new schedule is filed, the Interstate Commerce Commission, pending a hearing and decision by it as to the reasonableness of the new rates, may suspend the operation of the schedule for a period not exceeding seven months beyond the time the schedule otherwise would have become effective.

"In the instant case, following the filing of new rate schedules by four interstate bus carriers, the plaintiff filed with the Interstate Commerce Commission a protest to the schedules and re-

quested the Commission to suspend the proposed rates pending a determination of their reasonableness. The Commission decided against suspension, and, treating the protest as a formal complaint, set the matter down for hearing and decision. Plaintiff now seeks an order of this Court to compel the Commission to suspend the schedule pending such hearing and decision. The power of suspension of new rates for the limited period authorized under Title 49 USC sec. 316(g) is vested exclusively in the Commission and the Court is without power to review the exercise of its administrative discretion. See *Merchant Truckmen's Bureau of New York* v. *United States*, 16 F. Supp. 998; *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495; *Board of Railroad Commrs.* v. *Great Northern Ry. Co.*, 281 U.S. 412, 429. The Commission has, as yet, not completed its hearings and has entered no order such as would be subject to review by the Court under Title 28 USC secs. 1336, 2321, 2324, 2325 and Title 49 USCA sec. 305(g).

"The motion for an injunction is denied and the defendants' cross-motion to dismiss the complaint is granted."

The proposed rate is compensatory

The rates proposed by the carriers are not below cost, as suggested by appellant (p. 4 of its jurisdictional statement), but will, on account of the increased weight required, result in increased revenue per car for the railroads (R. A. 134). As pointed out above, there was ample evidence before the Commission that the rate proposed will result in revenues approximately 46% above out-of-pocket cost (R. A. 109, 134, 135).*

* Per car revenues under the $1.74 rate were shown as $1,305 against out-of-pocket cost of $892 (R. A. 109, 135).

In cases where the carriers propose rate reductions, the procedure followed by the Board of Suspension calls for it to secure the views of the Commission's Cost Finding Section as to the compensatory nature of such reductions. Where rates proposed are, in the opinion of the Cost Finding Section, non-compensatory, the Board customarily suspends them. The failure to suspend in this case thus indicates the Cost Finding Section approved the evidence submitted by the railroads showing that the reduced rates were well above cost.

The proposed rate was justified to relieve a rate disadvantage operating against Pacific Coast shippers

Not only were the reduced rates shown to be compensatory, but it was also shown that as a result of general increases in rates in recent years, Pacific Coast shippers of canned goods have been placed at an ever-increasing disadvantage with respect to Midwestern shippers. This growing disadvantage has resulted from the longer distances and higher rates from Pacific Coast points to eastern markets (R. A. 106, 111). For example, evidence was submitted to the Commission showing that rates on canned goods from Pacific Coast points to New York had increased from $1.02 in 1946 to $1.94 immediately prior to the establishment of the rate in question, or an increase of 92 cents per 100 pounds (R. A. 107). The rates from competing canning points in the Midwest have increased during the same period from an average of 65 cents to 93 cents, or an average increase of only 28 cents per 100 pounds. This represents an increase of only 43% from Midwest points as compared with an increase of 90.1% from the Pacific Coast during the same period. (Reply of Canners League of California, et al., filed October 9, 1959.

R. A. 104, et seq.) It is apparent from the figures submitted that the proposed reduction of 20 cents per 100 pounds in consideration of increased loading per car falls far short of restoring the prior rate relationship between Pacific Coast and Midwest shippers. The effort to restore the prior rate relationship accords with the admonitions of the Commission in *Increased Freight Rates 1951*, 281 I.C.C. 557, 637.

Since the proposed rates were shown to be compensatory and to promise greater revenues for the railroads, and as they were shown to be of great importance to Pacific Coast shippers to assist them in holding their Eastern markets against the growing competition of Midwestern producers who had been subjected to substantially lesser freight rate increases, the Commission's decision not to suspend the reduced rates was an informed, deliberative and well-founded exercise of discretion.

The court below was correct in dismissing Luckenbach's antitrust claim

The action of the district court in remanding the issue of alleged violation of the Antitrust laws to the Interstate Commerce Commission for consideration under the doctrine of primary jurisdiction is in accord with *United States* v. *R. C. A.*, 358 U.S. 334, 348 (1959), where this Court said:

> "* * * Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's deli-

cate regulatory scheme, and would throw existing rate structures out of balance."

In addition to throwing rate structures out of balance, if the District Courts throughout the United States were to have authority to upset the Commission's refusal to suspend rates the courts would be flooded with litigation and the calendars clogged with rate cases.

The desire of the court below to seek the observations of the Commission with respect to the extent and scope of the antitrust exemption provided by Section 5(a) of the Interstate Commerce Act* was fully justified since that section is administered by the Commission. Initial resort to an administrative agency is entirely proper where as here any part of the case is within the exclusive jurisdiction of the agency.†

The procedural determination of the district court in electing to dismiss the complaint without prejudice rather than to retain jurisdiction for later consideration followed the procedure approved in *Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952). Such a determination was in all respects proper in the light of the Court's decision on the issues of the case and appellant was in no way prejudiced by such action since it can reinstitute its suit if the Commission should decide adversely to appellant in the rate investigation proceeding now pending.

The decision of this Court in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934), answers all of the allegations of the complaint herein.

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* 49 U.S.C.A., Sec. 5b.

† Davis, Administrative Law Treatise, Sec. 19.07, p. 39 (1958)

and we respectfully submit that the Commission's action here should be approved for the reasons stated in that unanimous decision of this Court.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1959

No. 848

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court,
District of Delaware

BRIEF OF LUCKENBACH STEAMSHIP COMPANY, INC., OPPOSING MOTIONS TO AFFIRM

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IN THE

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v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From the United States District Court, District of Delaware

---

BRIEF OF LUCKENBACH STEAMSHIP COMPANY, INC., OPPOSING MOTIONS TO AFFIRM

Two motions to affirm have been filed, one on behalf of the United States and the Interstate Commerce Commission, the other (hereinafter referred to as "railroads' motion") on behalf of the other appellees. These motions seek the best of two irreconcilable worlds.

(1) The railroads' motion argues that the action is premature (pages 6-9), while the Government asserts that it is moot (page 4).

(2) The district court entered judgment dismissing appellant's complaint for want of jurisdiction. The motion to dismiss admitted the material allegations of the complaint,[1] that the Commission's refusal to suspend the rate was arbitrary and capricious and that the proposed reduced rail rate threatened appellant with immediate, serious and irreparable injury (R. 8, 9). And appellant sustained these allegations by proof, as it had to do in support of its motion for a temporary restraining order.[2] This proof was not controverted. On their motion, therefore, appellees' position was that, even if arbitrary and capricious, Commission refusal to suspend a rate is not reviewable (R. 110-111, 121-122, 130). And the court below so held: "So far as the action is by law committed to agency discretion it is not reviewable—even for arbitrariness or abuse of discretion." 179 F. Supp. 605, at 609, J. St. 6a.

Now appellees, on the one hand, argue that the Commission did not act arbitrarily (railroads' motion,

[1] *Myles Salt Co.* v. *Board of Commissioners*, 239 U.S. 478, 481 (1916). See also *Southern Music Pub. Co.* v. *Walt Disney Productions*, 73 F. Supp. 580, 582 (S.D.N.Y. 1947), *Knight* v. *Bolivar*, 156 F. Supp. 561, 563 (S.D.N.Y. 1957), *Amos* v. *Prom*, 115 F. Supp. 127, 131 (N.D. Iowa 1953), appeal dismissed 214 F. 2d 356.

[2] Thus, appellant showed, *inter alia*, the following: The Commission was told (without contradiction by the railroads) that the canned goods rate was intended to destroy appellant's competing service, was below the railroads' full costs, and, as the western railroads admitted, would result in an unnecessary sacrifice of rail revenues. The Commission itself recognized the questionable lawfulness of the rate by ordering an investigation. But, since the rate was to expire in one year and the Commission proceedings would consume most, if not all, of that period, the incomprehensible refusal to suspend permitted the rate to work its destructive effect and made the investigation an empty gesture.

pages 9-11) and, on the other hand (Government motion, page 5), seek to avoid or treat as inconsequential the basic fact that had to be assumed below and must now be assumed, namely, that the Commission's action was arbitrary and an abuse of discretion.

I. The Decisional Conflict

The Solicitor General argues that there is no conflict of decision below, relying on a distinction between jurisdiction to review the Commission's arbitrary refusal to suspend (this case) and the Commission's arbitrary vacation of a suspension order (many cases upholding jurisdiction to review). But both a refusal to suspend and the power to vacate suspension derive from the same language in Section 15 (7) of the Interstate Commerce Act, 49 U.S.C. § 15 (7). If the fact that the power to suspend is "by law committed to agency discretion" does not preclude review of the vacation of a suspension order, then it likewise does not preclude review of a refusal to suspend.

The Solicitor General himself has twice so argued in direct appeals in this Court.

> "While the decision below deals immediately with an order of the Commission vacating its prior suspension order, its rationale appears to be equally applicable to orders originally suspending or refusing to suspend rates."[3]

Now, without explanation or even a suggestion that his position has changed, the Solicitor General asserts the

[3] See the Solicitor General's jurisdictional statement in United States v. Amarillo-Borger Express, 352 U.S. 817 (1956). The same argument was made by reference in his jurisdictional statement in United States v. Dixie Carriers, 353 U.S. 906 (1957). Both appeals were eventually dismissed as moot 352 U.S. 1028 (1957), 355 U.S. 179 (1957).

absence of a conflict upon the sole ground that there is a conclusive distinction between cases involving orders vacating a prior suspension and those involving refusal to suspend in the first instance. He does not support the asserted distinction; or even argue that there is a difference in principle.

Moreover, even taking the Solicitor General's distinction, the conflict among the three-judge district courts is nevertheless substantial. It was expressly recognized with respect to this very case by the court in *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63, 66 (N.D. Ohio 1960), quoted in our Jurisdictional Statement, p. 6. Both *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D.N.Y. 1958), and *Marine Transport Lines* v. *United States*, 173 F. Supp. 326 (D.C. 1959), reversed the mere refusal to suspend. The court in *Seatrain* said (p. 828):

> "There is nothing in the statute or in the cases which would deprive the court of jurisdiction to direct the suspension of such unlawful rates under these circumstances. The court does not lack such jurisdiction."

The Solicitor General attempts to deal with *Seatrain* and *Marine Transport* by claiming that they involve inadequate findings under the long-and-short-haul clause of Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4. The attempted distinction confuses jurisdiction to review with the substantive ground for reversal. The fact that the Commission's findings in *Seatrain* and *Marine Transport* were inadequate was the basis for the holding that its refusal to suspend was arbitrary. Here the motion to dismiss conceded, and the court assumed, that the refusal to suspend was arbitrary. The basic question of jurisdiction to review is identical. As to that, *Seatrain* and *Marine Trans-*

port held that the arbitrary refusal to suspend is reviewable. The court below held that it is not.

The conflict is broad and deep. Opposed to the decision below and the other cases standing categorically against reviewability are the following:

Inland Steel Co. v. *United States*, 306 U.S. 153, 159 (1939).

> An interlocutory injunction issued by a three-judge court against the Commission and the railroads, directing suspension of a tariff provision, was upheld as a lawful exercise of the district court's equity jurisdiction to review Commission action, though the permanent injunction was denied on the merits.

Seatrain Lines v. *United States*, 168 F. Supp. 819, 828 (S.D.N.Y. 1958).

> A three-judge court reviewing a Commission order refusing to suspend, held: "There is nothing in the statute or in the cases which would deprive the court of jurisdiction to direct the suspension of such unlawful rates under these circumstances. The court does not lack such jurisdiction."

Marine Transport Lines, Inc. v. *United States*, 173 F. Supp. 326 (D.C. 1959).

> A three-judge court issued a temporary restraining order directing suspension, and, at the conclusion of the litigation, a permanent injunction against the Commission and the railroads.[4] See fn. 1, pp. 327-328.

[4] During the course of the litigation the court had dissolved the temporary restraining order—not for want of jurisdiction to direct suspension but because there was an insufficient showing of irreparable injury.

Amarillo-Borger Express v. *United States*, 138 F. Supp. 411 (N.D. Tex. 1956).

A three-judge court, after a detailed discussion of its jurisdiction, set aside an order vacating suspension, directed suspension, and enjoined the use or application of the thus suspended tariff rates.

Long Island Rail Road Company v. *United States*, 140 F. Supp. 823, 827 (E.D.N.Y. 1956).

A three-judge court followed *Amarillo-Borger, supra*, directed suspension, and stated the general rule as ". . . the refusal or granting of suspension is a matter confided to the discretion of the Commission and no court has jurisdiction to review the Commission's decision unless it has refused to exercise discretion or has exercised it arbitrarily.".

Pacific Inland Tariff Bureau v. *United States*, 129 F. Supp. 472 (D.C. Ore. 1955).

A three-judge court issued a temporary restraining order enjoining railroads and the Commission from putting into effect disputed rates and, after consideration of its jurisdiction, made the injunction final and permanent.

Cantlay & Tanzola v. *United States*, 115 F. Supp. 72 (S.D. Calif. 1953).

A three-judge court denied a motion to dissolve its temporary restraining order enjoining the railroads and the Commission from putting the reduced rates into effect.

The need for resolution of the conflict is sharpened by the increasingly expressed doubts as to earlier, sweeping assertions of judicial impotence in the face of administrative arbitrariness, pointed out at pages 6-7 of appellant's Jurisdictional Statement.

II. Arbitrary Refusal to Suspend Is Reviewable

The view that the arbitrary refusal to suspend is wholly immune from judicial review rests exclusively upon (1) a self-defeating interpretation of section 10 of the Administrative Procedure Act (5 U.S.C. § 1009) excepting from review agency action "by law committed to agency discretion," and (2) a confusion as to jurisdiction to enjoin rates as an original matter and, on the other hand, to review agency refusal to suspend rates.

1. Section 10 of the Administrative Procedure Act.

The court below accepted, and the Government still urges, the view that, because section 15(7) of the Interstate Commerce Act provides that the "Commission may from time to time suspend," the action of suspension is by law committed to agency discretion and, therefore, immune from judicial review under the preamble to Section 10 of the Administrative Procedure Act.

Section 10 of the Administrative Procedure Act provides in relevant part:

> "Except so far as . . . (2) agency action is by law committed to agency *discretion*—
>
> * * *
>
> "(e) . . . [the court shall] (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of *discretion*, or otherwise not in accordance with law . . ." (Emphasis added)

The quoted provisions are seemingly inconsistent with each other. If agency action committed to agency discretion is excepted from the review provisions of Section 10(e), it is difficult to understand in what

cases a court is empowered to set aside an abuse of discretion. The inconsistency is, however, more apparent than real. What was actually intended was that the court was not to substitute its discretion for that of the agency but, nevertheless, was to retain its traditional power to correct agency abuse of discretion. This is borne out by the legislative history set out in the footnote below, quoted in part from *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411, 418 (N.D. Tex. 1956).[5]

---

[5] Senator Donnell asked the following question of Senator McCarran, who was in charge of the legislation:

> "Mr. Donnell: I should like to ask the distinguished Senator a question. Section 10 [now 5 U.S.C.A. § 1009] of the bill recites in part that—
>
> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> • • •
>
> "... The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?
>
> "Mr. McCarran: Mr. President, let me say, in answer to the able Senator that the thought uppermost in preparing this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.
>
> • • •
>
> "Mr. Donnell: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?
>
> "Mr. McCarran: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

The view that, because the power to suspend is discretionary, abuse of discretion is excepted from judicial review is in conflict with, and far less cogent than the holding in *Amarillo-Borger Express* v. *United States, supra*, at p. 418, that—

> "A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision."

And the *Amarillo-Borger* analysis of the statute was specifically approved in *Long Island Rail Road Co.* v. *United States*, 140 F. Supp. 823, 829 (E.D.N.Y. 1956).

2. Original Power to Enjoin v. Jurisdiction to Review.

The sweeping rejection below of jurisdiction to review arbitrary refusal to suspend is based upon four other three-judge district court cases.[6] They in turn are all based on a misreading of *Board of Railroad Com'rs.* v. *Great Northern Ry. Co.*, 281 U. S. 412 (1930). This aberration from the normal rule of judicial review is founded on error.

The *Great Northern* case involved intrastate rail rates which the North Dakota Commission had ordered reduced. The carriers attacked the rates before the Interstate Commerce Commission and concurrently instituted a suit in the district court to enjoin the order of the State Commission pending completion of the

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[6] *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935); *Carlson* v. *United States*, 107 F. Supp. 398 (S.D.N.Y. 1952); *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87 (S.D.N.Y. 1954); *Coastwise Line* v. *United States*, 157 F. Supp. 305 (N.D. Calif. 1957).

I.C.C. proceedings. The Interstate Commerce Commission was not a party to the suit and no question of arbitrary action by it was involved. The Court held (pp. 426-427):

> "We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission."

The case thus had nothing to do with review of the Interstate Commerce Commission's refusal to suspend a rate, or indeed review of any other Interstate Commerce Commission action.[7]

The Court, however, discussed the question whether there was original judicial jurisdiction to enjoin a proposed rate. It pointed out that prior to 1910 the Interstate Commerce Commission had no suspension power; that there had been a conflict among the district courts as to their jurisdiction to enjoin a proposed rate as an original matter pending an Interstate Commerce Commission proceeding; and that the Mann-Elkins Act of 1910 (section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7)) gave the Commission the power to suspend a rate pending investigation. It was in this context that Chief Justice Hughes said "This power of suspension was entrusted to the Com-

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[7] The court below made no reference to *Great Northern* but (179 F. Supp. at page 609, J. St. 7a) relied upon *M. C. Kiser Co. v. Central of Ga. Ry. Co.*, 236 F. 573 (S.D. Ga. 1916), aff'd 239 F. 718 (5th Cir. 1917), which, like *Great Northern*, involved no question of review of refusal to suspend or of any other action of the Interstate Commerce Commission. The court merely held that it had no jurisdiction, as an original matter, to enjoin a railroad rate prior to action by the Commission.

mission only",[8] meaning that, whatever the situation theretofore, the courts no longer had original jurisdiction to enjoin rates.

The Chief Justice obviously implied that the power to suspend was entrusted to the Commission as a matter of primary jurisdiction and he certainly did not even suggest that judicial review was foreclosed. This is apparent not only from his statement, quoted above, that a state rate could not be interdicted "before appropriate action by the Interstate Commerce Commission", but also from his reference (pp. 422, 423) to *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which established the primary jurisdiction rule. And basic to that rule is the reviewability of agency action for the correction of arbitrari-

[8] Chief Justice Hughes' full statement (pp. 429-430) is:

"When, before the Amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this court in the Abilene Cotton Oil Co. and other cases, supra. Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, § 15 (7); [June 18, 1910] 36 Stat. at L. 552, chap. 309; [February 28, 1920] 41 Stat. at L. 486, 487, chap. 91, U.S.C. title 49, § 15 (7). This power of suspension was entrusted to the Commission only. There is no similar provision for the suspension of intrastate rates established by state authority."

ness or other legal error. *United States* v. *Western P.R. Co.*, 352 U.S. 59, 63-64 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575, 577 (1952); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139 (1939).

The language of the Court that the suspension power "was entrusted to the Commission only", divorced from its context, has been seized upon to justify a sweeping rejection of jurisdiction to review arbitrary Commission refusal to suspend. The resulting distortion calls for examination of the question by this Court and correction of the errors proliferated by the misreading of *Great Northern*.

III. Applicability of the Primary Jurisdiction Rule

The Solicitor General's avoidance of any discussion of the issue of the Commission's primary jurisdiction of the antitrust cause of action and his unsupported and patently unsupportable and irrelevant suggestion of an alternative judicial remedy (pages 6-7) amount to a confession of error. And there was vital error.

Appellant's antitrust cause of action did not allege that the railroads' collective rate-making procedures were themselves a violation of the Sherman Act. Indeed, it expressly alleged (R. 6) that such procedures were exempt from the antitrust laws by the Reed-Bulwinkle Act (section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b). But Reed-Bulwinkle is a carefully circumscribed statute that lifts the ban of the antitrust laws only from the joint rate-making procedures themselves. The thrust of the complaint (R. 10) is that use of such procedures for the purpose and with the intent of destroying a competitor is, as it has been in the past, a violation of the antitrust laws. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945).

Thus, whatever the scope of the exemption accorded a Commission-approved Reed-Bulwinkle agreement, the Commission is wholly without power to approve a rate-fixing agreement having as its intent and purpose the destruction of a competitor.

But the court below, although it recognized that Reed-Bulwinkle "certainly does not sterilize all forms of conspiratorial action," nevertheless applied the primary jurisdiction rule, saying "it is incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption." 179 F. Supp. 605 at 614, J. St. 14a-15a. Thus, the court dismissed the antitrust cause of action solely on the basis of a referral to the Commission of an issue that was not in the case.

This holding is irreconcilable with *Atchison, T. & S.F. Ry. Co.* v. *Aircoach Transp. Ass'n*, 253 F. 2d 877, 887 (D.C. Cir. 1958), which held that the question of intent and purpose to destroy a competitor was to be tried by the district court and not by the Commission, saying, "We do not think the [Reed-Bulwinkle] Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purposes of eliminating the competition of Aircoach. . . . Moreover, this aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law."[9]

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[9] In *Risse & Co.* v. *Association of American Railroads*, 170 F. Supp. 354, 365 (D.C. 1959) the court, following Aircoach, said:

> "On the second question, it was held in ACTA [Aircoach] that, under no circumstances could antitrust immunity under 49 U.S.C.A. § 5b(9) be held to apply to the use of approved procedures to set . . . rates if they were part of an effort by railroads in combination or conspiracy to eliminate the competition of Aircoach."

But even if, notwithstanding the contrary holding in *Aircoach*, application of the primary jurisdictional rule would otherwise have been appropriate, its mechanical invocation in the circumstances of the instant case was self defeating and erroneous. As this Court said in *United States* v. *Western P. R. Co.*, 352 U. S. 59, 63 (1956):

> "The doctrine of primary jurisdiction . . . is concerned with promoting proper relations between the courts and administrative agencies charged with particular regulatory duties."

And, reiterating a basic principle (p. 64):

> "In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."

Application of the primary jurisdiction rule is inappropriate whenever it will defeat the purpose of the rule or impede rather than promote proper court-agency relationships. This was wholly overlooked in this case.

The means for the effectuation of the antitrust conspiracy was the reduced railroad rate that was designed to destroy appellant's competing service. The proposed rate, by its own terms, was to be in effect for only one year, ten months of which remained at the time of the decision below. There was no reasonable prospect that Commission proceedings relating to antitrust charges as well as to the lawfulness of the proposed rate, could be concluded within that time. In any event, it was certain that both Commission and court proceedings could not possibly be completed. Thus, application of the primary jurisdiction rule was

self defeating and improper since it made it impossible for either the Commission or the court to perform its function.[10]

But even if application of the primary jurisdiction rule had been proper, the court should have retained jurisdiction of the antitrust cause of action pending Commission proceedings. Dismissal seriously prejudiced appellant. The court relied upon *Far East Conference* v. *United States*, 342 U.S. 570 (1952), which expressly held that the dismissal there was appropriate because no prejudice would result.

On the other hand, where the dismissal would result in prejudice, the late Judge Fee, in *Bustos-Ovalle* v. *Landon*, 225 F. 2d 878, 881 n. 5 (9th Cir. 1955), stated:

> "In applying the doctrine of primary jurisdiction, the court may dismiss the complaint where the question involves an administrative question necessitating primary resort to the administrative tribunal. However, the presence of such an administrative question does not deprive the court of jurisdiction, and where there are rights which may be saved by retaining the cause, the court should do so but stay its hand pending the administrative determination."

Here the court had issued and, after argument had continued, a temporary restraining order against the railroads. Had the case been retained, the temporary restraining order might have been continued in effect.

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[10] If the Commission should hold that the railroads have not conspired or otherwise acted in violation of the antitrust laws, *query*, whether appellant would be limited to the three-judge court review procedure or would be free to pursue de novo its Sherman Act remedies, as in *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959); cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945).

or appellant might have been granted a preliminary injunction. These remedies were denied appellant, not for want of merit but because the case was dismissed under an erroneous application of the primary jurisdiction rule.

IV. Mootness

The mootness point, referred to but not argued by the Government (page 4), it should be noted, does not affect the appeal from the dismissal of appellant's antitrust cause of action.

As to its relevance to review of the Commission's refusal to suspend, the short answer is that the railroads announced to the Commission on January 25, 1960, that they intend to file a tariff either cancelling the October 22, 1960, expiration of the reduced rate or further reducing the rate (Commission hearings pp. 25-26, 155-156; see also p. 969). The situation will then be precisely the same as that precipitated by the Commission's refusal to suspend in the fall of 1959. Accordingly, the present case is not moot.

> Where . . . interest[s] of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, . . . the mere fact that the particular subject matter of the instant cause has expired does not render the case moot.

Boggess v. *Berry Corp.*, 233 F. 2d 389, 391 (9th Cir. 1956), citing *Southern Pac. Term. Co.* v. *I.C.C.*, 219 U.S. 498, 515-516 (1911). To like effect see *Southern Pac. Co.* v. *I.C.C.*, 219 U.S. 433, 452 (1911), *Dyer* v. *S.E.C.*, 266 F. 2d 33, 47 (8th Cir. 1959), *Derringer* v. *Plummer*, 240 F. 2d 922, 925 (5th Cir. 1956), *Lansden* v. *Hart*, 180 F. 2d 679, 684 (7th Cir. 1950), cert. den.

340 U.S. 824; cf. *Ford Motor Co.* v. *United States*, 335 U.S. 303, 313 (1948).

If the instant appeal were dismissed as moot, appellant, after newly instituted proceedings, would again be met with the objection of mootness before completion of judicial review. Of the like frustration threatened in *Southern Pac. Term. Co., supra,* this Court said (p. 515):

> * * * The question[s] involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.

See also *Dyer* v. *S.E.C., supra.*

Settlement by this Court of the issue of reviewability of Commission exercise of the suspension power, notwithstanding its substantiality, has been frustrated by mootness in the past. *United States* v. *Amarillo-Borger Express,* 352 U.S. 1028 (1957), *United States* v. *Dixie Carriers,* 355 U.S. 179 (1957). The instant appeal presents an unusual opportunity which, we submit, should be seized upon to determine this increasingly recurring question of far reaching importance.

V. Prematurity

To the Government's Scylla of mootness the railroads (pages 6-9) have juxtaposed the Charybdis of prematurity. The railroads' point likewise is without merit since appellant claimed to be injured by, and sought relief from, the failure of the Commission to

suspend the rate. As to that, the administrative action was final and the case was ripe for review.

Moreover, appellant alleged and proved without challenge that it was threatened by immediate, serious and irreparable injury. In the face of that threat, there was no administrative remedy to be exhausted as a prerequisite to judicial review. *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72, 76 (S.D. Calif. 1953), *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472 (Oreg. 1955), *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 55-56 (D.C. Cir. 1954), *cert. denied* 347 U.S. 990.

Indeed, what the railroads really are saying is that the action is premature until it becomes moot. For, at the time the action was commenced, the rate, by its own terms, was to expire a year later. There was no indication that the railroads would extend the effective period of the rate or publish a lower rate. Nor is it now known for what period the new tariff that the railroads intend to file will be effective. Thus, deferral of court action until termination of the administrative proceedings (hearings of which have not yet been completed) would have resulted in the case becoming moot before final judicial determination with respect to the tariff already filed and even perhaps with respect to the tariff to be filed.

VI. The "No Order" Argument

The assertion in the railroads' motion (page 8) that "The mere refusal to exercise its discretionary power temporarily to suspend the rate pending investigation is not an order subject to review" suggests that the Commission may immunize its actions from judicial review merely by labeling its action "refusal to order"

instead of "order". It is reminiscent of the negative order doctrine that *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 140-142 (1939), was thought to have laid to rest.

When the Commission said "no" to appellant's request for suspension, it made an order with as much force and effect, although with contrary results, as if it had said "yes." And it should be unnecessary even to discuss whether reviewability of action, fraught with consequences injurious to appellant, turns upon nomenclature, in light of the fact that agency action may constitute an order even though not so labeled. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 416 (1942).

In any event, the label "order" actually has been affixed by the Commission to its document which granted appellant only partial relief by ordering an investigation of, but refusing to suspend, the proposed rate. J. St. 23a-24a.

CONCLUSION

The substantiality of the question presented by the instant case was recognized by this Court when it noted probable jurisdiction in *Amarillo-Borger* and *Dixie Carriers*, both *supra*. The question, moreover, is recurring frequently and the courts below are in irreconcilable conflict as to their jurisdiction. Again, as in *Amarillo-Borger* and *Dixie Carriers*, resolution of the issue by this Court is likely, in most instances, to be defeated by mootness. That bar, however, does not exist in this case which thus presents an almost unique opportunity to have the matter finally determined.

Likewise substantial and of growing importance is the broad question, never passed upon by this Court

and as to which there is a conflict below, of the accommodation of court-agency relationships vis-a-vis the Reed-Bulwinkle Act and the antitrust laws.

The motion to affirm should be denied and probable jurisdiction noted.

Respectfully submitted,

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